Malek Ridzuan bin Isroll v Public Prosecutor

A

HIGH COURT (IPOH) — CRIMINAL APPEAL NOS 42H-14–03 OF 2014, 42H-11–03 OF 2014, 42H-12–03 OF 2014, 42H-13–03 OF 2014 AND 41H-33–04 OF 2014
NOORIN BADARUDDIN JC
3 OCTOBER 2014

B

Criminal Procedure — Appeal — Appeal against sentence — Various offences — Accused person charged for offences of rape, committing carnal intercourse against order of nature and impersonating public servant in sessions court and theft magistrate's court — Accused person pleaded guilty and convicted for all sentences — Sentences to run separately — Accused person sentenced to total of 36 years and 3 months imprisonment and 19 strokes of whipping — Appeal in order for sentences to run consecutively — Penal Code ss 170, 376, 377C & 379

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The appellant had pleaded guilty for various offences charged against him and had filed separate appeals to the High Court against all the sentences imposed on him. The appeals were called and heard together. Facts of the first case revealed that the appellant had stopped the victim and a male friend who were riding on a motorcycle and told them both that he was a policeman and pointed to them the green police vest that he was wearing. The appellant told the victim and her male friend that they were stopped because they were riding beyond the speed limit. The appellant told them further that to avoid them from being held in the police lock-up, they have to follow the appellant to the police station. The appellant then instructed the victim's male friend to go home while the victim was asked to follow the appellant. The victim rode on the motorcycle with the appellant as she was afraid that she would be detained in the police lock-up. The appellant then took the victim to a jungle area and raped her and committed carnal intercourse against the order of nature by inserting his penis into the victim's anus. In the sessions court, the appellant was convicted for the offences of rape, committing carnal intercourse and impersonating public servant under ss 376, 377C and 170 of the Penal Code ('Code'), respectively. In another case, the appellant had stopped another victim and introduced himself as a policeman. The appellant then asked the victim to show her identification card and driving license. When told by the victim that she did not have the documents, the appellant then instructed her to follow him on his motorcycle to the police station. The appellant then took the victim to an area near a river and there, he committed carnal intercourse against the order of nature against her will. The appellant was convicted for an offence under s 376 of the Code. Meanwhile, in the magistrate's court, the appellant was convicted under s 379 of the Code for stealing a handphone and was sentenced to 15 months imprisonment. For the seven offences, the

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sentences were to run separately which meant that the appellant was sentenced to a total of 36 years and three months of imprisonment and 19 strokes of whipping. In the present appeal against the sentences, the appellant prayed for the sentences to run concurrently taking into account that for all the offences in the appeals the appellant had pleaded guilty at the very early stages and had therefore saved the court's time. The appellant further argued that the guilty plea of the appellant had spared the victims from coming to court to testify and they did not have to relive their traumatic experience.

Held, dismissing the appeal; affirming the sentences passed by the sessions and magistrate courts:

(1) The power of sentencing given to the trial court is discretionary. In an appeal against sentence, an appellate court would not disturb the sentence imposed unless the trial court had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous exercise of discretion. There were no cogent reasons to disturb the findings made by the learned sessions judges and the magistrate (see paras 17 & 19).

(2) It was obvious that all the offences in all the cases were separate and distinct. The sessions court judges and magistrate were justified in ordering the sentences to run consecutively. The seriousness of the offences committed by the appellant warranted a lengthy imprisonment sentence. Even though the sentences imposed will have a crushing effect on the appellant, the seriousness of the offences committed and the demand of protection of the public interest forfeited the interest of the appellant (see paras 22 & 27).

(3) It would not be an exaggeration to say that from the facts of all the cases, the appellant could be equated to that of a sexual predator. He attacked young victims. The appellant was a real threat to the public and to young girls in particular. The public must be protected. The appellant also had a modus operandi by impersonating. The safety of the public is at stake with criminal like the appellant around. He is not suitable to be in the community. He must be incarcerated from the society for a longer period of time (see paras 28–29).

[Bahasa Malaysia summary

Perayu telah mengaku bersalah untuk pelbagai kesalahan dituduh terhadapnya dan telah memfailkan rayuan berasingan ke Mahkamah Tinggi terhadap kesemua hukuman yang dikenakan atasnya. Rayuan dipanggil dan didengar bersama. Fakta kes pertama menunjukkan bahawa perayu telah menghentikan mangsa dan teman lelakinya yang sedang menaiki motorsikal dan memberitahu mereka berdua bahawa dia adalah anggota polis dan menunjukkan kepada mereka ves polis berwarna hijau yang dipakai olehnya.

Perayu memberitahu mangsa dan teman lelakinya yang mereka dihentikan kerana mereka menunggang melampaui had kelajuan. Perayu memberitahu mereka bahawa untuk mengelakkan daripada ditahan di penjara polis, mereka perlu mengikut perayu ke balai polis. Perayu kemudiannya mengarahkan teman lelaki mangsa untuk pulang ke rumah manakala mangsa diarahkan untuk mengikut perayu. Mangsa kemudian menaiki motosikal bersama dengan perayu kerana dia takut dia akan ditahan dalam lokap polis. Perayu kemudian membawa mangsa ke kawasan hutan dan merogolnya, melakukan persetubuhan yang bertentangan dengan aturan tabii dengan memasukkan zakarnya ke dubur mangsa. Di mahkamah sesyen, perayu disabitkan untuk kesalahan merogol, melakukan persetubuhan luar tabii dan menyamar sebagai anggota awam di bawah ss 376, 377C dan 170 Kanun Keseksaan ('Kanun'), masing-masing. Dalam kes lagi satu, perayu telah menghentikan satu lagi mangsa dan memperkenalkan dirinya sebagai seorang anggota polis. Perayu kemudian meminta mangsa untuk menunjukkan kad pengenalan lesen memandunya. Apabila diberitahu oleh mangsa bahawa dia tidak mempunyai dokumen itu, perayu telah mengarahkan mangsa untuk mengikutinya di atas motosikalnya ke balai polis. perayu kemudian membawa mangsa ke kawasan berhampiran sungai dan di situ, dia telah melakukan persetubuhan luar tabii tanpa kehendak mangsa. Perayu telah disabitkan untuk kesalahan di bawah s 376 Kanun. Manakala, di mahkamah majistret, perayu telah disabitkan di bawah s 379 Kanun kerana mencuri telefon bimbit dan dihukum 15 bulan penjara. Untuk tujuh kesalahan, hukuman berjalan secara berasingan yang bererti perayu dihukum secara keseluruhan 36 tahun dan 3 bulan penjara serta 19 sebatan rotan. Dalam rayuan ini terhadap hukuman, perayu memohon untuk hukuman berjalan serentak mengambil kira bahawa untuk kesemua kesalahan dalam rayuan, perayu telah mengaku bersalah pada peringkat awal dan oleh itu telah menjimatkan masa mahkamah. Perayu seterusnya berhujah bahawa pli bersalah perayu telah melepaskan mangsa daripada hadir ke mahkamah untuk memberi keterangan dan mereka tidak perlu untuk mengingatkan kembali pengalaman trauma mereka.

Diputuskan, menolak rayuan, mengesahkan hukuman yang dikenakan oleh mahkamah sesyen dan majistret:

(1) Kuasa untuk menghukum yang diberikan kepada mahkamah perbicaraan adalah satu budi bicara. Dalam satu rayuan terhadap hukuman, mahkamah rayuan tidak akan mengusik hukuman yang dikenakan melainkan mahkamah perbicaraan terkhilaf dalam mengguna pakai prinsip yang betul dan telah menggunakan budi bicara yang tidak dibenarkan atau tidak berkaitan. Tiada sebab yang kukuh untuk mengusik dapatan yang dibuat oleh hakim mahkamah sesyen dan majistret yang bijaksana (lihat perenggan 17 & 19).

(2) Adalah jelas bahawa kesemua kesalahan di dalam kesemua kes adalah berasingan dan berbeza. Hakim mahkamah sesyen dan majistret

mempunyai alasan yang kuat dalam memerintahkan hukuman untuk berjalan secara berasingan. Keseriusan kesalahan yang dilakukan oleh perayu mewajarkan hukuman penjara yang panjang. Walaupun hukuman yang dikenakan akan mempunyai kesan yang buruk atas perayu, tetapi keseriusan kesalahan yang dilakukan dan keperluan keselamatan kepentingan awam menggugurkan kepentingan perayu (lihat perenggan 22 & 27).

(3) Ia bukanlah satu perkara yang diperbesarkan untuk mengatakan bahawa daripada fakta kesemua kes, perayu boleh disamakan kepada pemangsa seksual. Dia menyerang mangsa yang muda. Perayu adalah ancaman sebenar kepada orang awam dan secara khusus terhadap wanita muda. Orang awam hendaklah dilindungi. Perayu juga mempunyai modus operandi dengan penyamaran. Keselamatan orang awam dipertaruhkan dengan adanya penjenayah seperti perayu. Dia tidak bersesuaian untuk berada dalam komuniti. Dia mesti dipisahkan daripada masyarakat untuk tempoh masa yang lama (lihat perenggan 28–29).]]]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 375–432.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Mohd Zandere bin Arifin v PP [2006] 5 MLJ 685; [2006] 5 CLJ 663, HC (refd)
PP v Wong Chak Heng [1985] 1 MLJ 457 (refd)
PP v Yap Huat Heng [1985] 2 MLJ 414; [1986] CLJ (Rep) 645 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45, HC (refd)
Zaidon bin Shariff v PP [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

Legislation referred to

Penal Code ss 170, 376, 377C, 379, 511

Pardeep Singh for the appellant.
How May Ling (Harris Ong with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Noorin Badaruddin JC:

[1] The appellant had pleaded guilty for various offences charged against him and had filed separate appeals to the High Court against all the sentences imposed on him.

[2] The counsel for the appellant had applied orally for all the appeals to be heard together. The application was allowed and hence before this court, all the above mentioned appeals were called and heard together. As mentioned earlier, all the appeals were against sentence where in all the cases, the appellant had pleaded guilty on all the charges preferred against him.

[3] For ease of reference the summary of the appeals are as follows:

(a) Appeal Nos 42H-11–03 of 2014; 42H-12–03 of 2014 and 42H-13–03 of 2014:

These appeals were against the sentences imposed by the learned sessions judge in Ipoh on 21 February 2014. These appeals originated from three cases which were heard together ie cases No 62–231–10 of 2013; No 62–232–10 of 2013 and No 83–38–10 of 2013.

(i) the charge in Case No 62–231–10 of 2013 was under s 376 of the Penal Code. The charge reads:

> Bahawa kamu pada 25.9.2013 antarajam lebih kurang 9.25 malam hingga 10.15 malam bertempat di kawasan hutan Jalan Changkat Mendaling Batu Gajah, di dalam daerah Batu Gajah di dalam Negeri Perak didapati telah merogol Noor Albaniah Binti Nor Eddy Syam, KPT No: 961130-08-6280. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

The appellant pleaded guilty and was sentenced to 15 years of imprisonment and five strokes of whipping;

(ii) the charge in Case No 62–232–10 of 2013 was under s 377C of the Penal Code. The charge reads:

> Bahawa kamu pada 25/9/2013 antara jam lebih kurang 9.25 malam hingga 10.15 malam bertempat di kawasan hutan Jalan Changkat Mendaling Batu Gajah, di dalam Daerah Batu Gajah, di dalam negeri Perak dengan sengaja telah cuba melakukan persetubuhan yang bertentangan dengan aturan *tabii* untuk memasukkan zakar ke dalam dubur Noor Albaniah binti Nor Eddy Syam, KPT No. 961130-08-6280 tanpa kerelaannya. Dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 377 C Kanun Keseksaan dan dibacakan bersama di bawah Seksyen 511 di bawah peruntukan yang sama.

The appellant pleaded guilty and was sentenced to seven years of imprisonment and three strokes of whipping;

(iii) the charge in Case No 83–38–10 of 2013 was under s 170 of the Penal Code ie personating a public servant by wearing a police vest. The charge reads:

> Bahawa kamu pada 25/9/2013 antara jam lebih kurang 9.25 malam bertempat di tepi kilang Dutch Lady Tingkat Zarib Pinji Mewah, Batu Gajah, di dalam Daerah Batu Gajah, di dalam negeri Perak didapati telah menyamar sebagai penjawat awam dengan memakai vest polis kepada Noor Albaniah binti Nor binti Nor Eddy Syam, KPT No. 961130-08-6280. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 170 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

The appellant pleaded guilty and was sentenced to six months of imprisonment;

(iv) the learned sessions judge ordered for all the three sentences to run concurrently and that the sentences were to run after the appellant has served his sentence for Case No 62–233–10 of 2013 (Appeal No 42H-14–03 of 2014);

(v) the facts of the case revealed that on 25 September 2013 at about 9pm, the victim and her male friend by the name of Mohd Khairul Nizam were riding on a motorcycle and were on their way home. At a Dutch Lady factory at Tingkat Zarib Pinji Mewah Lahat, they were stopped by the appellant who was riding a motorcycle. The appellant then told both the victim and her male friend that he was a policeman and pointed to them the green police vest that he was wearing;

(vi) the appellant told the victim and her male friend that they were stopped because they were riding beyond the speed limit. The appellant told them further that to avoid them from being held in the police lock-up, they have to follow the appellant to the Simpang Pulai Ipoh, Police Station. The appellant then instructed the victim's male friend to go home while the victim was asked to follow the appellant. The victim rode on the motorcycle with the appellant as she was afraid that she would be detained in the police lock-up;

(vii) the appellant then took the victim to a jungle area at Jalan Changkat Mendaling, Batu Gajah, Perak. The victim managed to send a short message to her friend through her hand phone to call for the police; and

(viii) upon arriving at the said jungle area, the appellant pushed the victim into the undergrowth area. The victim put up a struggle by hitting the appellant with a helmet and kicked him several times.

This resulted in the appellant being more aggressive and he took off her shirt and pants. Thereafter he took off his pants and had raped the victim. The appellant also committed carnal intercourse against the order of nature by inserting his penis into the victim's anus. Later, the appellant took the victim out from the jungle area and the victim called her friend to fetch her. The victim in this case was 16 years of age during the incident;

(b) Appeal No 42H-14–03 of 2014.
(In the Special Session Corruption Court Case No 62–233–10 of 2013):

(i) the charge in Case No 62–233–10 of 2013 was under s 377C of the Penal Code. The appellant had pleaded guilty and was sentenced to 12 years of imprisonment and four strokes of whipping on 21 September 2013;

(ii) the learned sessions judge had ordered the sentence to run after the appellant has served sentence for Case No 62–229–10 of 2013;

(iii) no appeal was filed as to the Case No 62–229–10 of 2013. At p 9 of the appeal record of 42H-14–03 of 2014 (Case No 62–233–10 of 2013), the learned sessions judge stated at para 111 as follows:

> Selain itu, OKT juga pada hari yang sama telah mengaku salah bagi kesalahan cubaan merogol di bawah seksyen 376/511 Kanun Keseksaan terhadap mangsa yang lain di Mahkamah ini dalam kes 62-229-10/2013 dan dijatuhkan hukuman 8 tahun penjara dari tarikh tangkap dan 2 kali sebatan.

(iv) in Case No 62–233–10 of 2013, the facts disclosed that on 21 September 2013, at about 8am the victim who was then 13 years old, sent her mother to work, riding on a motorcycle. Later, the mother of the victim called her son to find out whether the victim had arrived home and was told that she did not. At about 12.30pm, the mother of the victim was told that the victim had arrived home and that she was raped by an unknown malay man later known as the appellant;

(v) the victim told her mother that after sending her mother off to work earlier and on her way back home, the appellant who was riding a red Yamaha motorcycle bearing registration No AJE 6838 had followed her;

(vi) the appellant then stopped the victim and introduced himself as a policeman. The appellant then asked the victim to show her identification card and driving license. When told by the victim that she did not have the documents, the appellant then instructed her to follow him on his motorcycle to the police station. The

appellant then took the victim to an area near a river and there, he committed carnal intercourse against the order of nature against her will; and

(vii) the victim was taken to the Raja Permaisuri Bainun's hospital and from the examination, she was said to have suffered fresh injuries at the internal part of her anus caused by a blunt trauma;

(c) Appeal No 41H-33–04 of 2014:
(Case No 83RS-4–3 of 2014 Magistrate Court in Batu Gajah):

(i) the appellant was charged for an offence under s 379 of the Penal Code. The charge reads:

> Bahawa kamu pada 11/9/2013 jam lebih kurang 9.50 malam bertempat di tepi jalan Tanah Adat Mendaling, belakang Kelab Golf Clearwater Sanctuary, Batu Gajah di dalam Daerah Batu Gajah di dalam Negeri Perak dengan niat mencuri sebuah telefon bimbit jenama Samsung Galaxy Y, warna hitam yang bernilai RM500 kepunyaan Nurashidah Bt Zulkapli, KPT No: 981027-08-7734 tanpa kebenarannya.
>
> Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 379 Kanun Keseksaan dan dihukum di bawah peruntukan yang sama.

(ii) the appellant pleaded guilty. On 6 March 2014, the learned magistrate sentenced the appellant to 15 months of imprisonment and the sentence was to run from the date after the appellant had served all the sentences imposed on him for the other offences;

(iii) the facts of the case produced before the court were, that on 11 September 2013, the appellant had invited the victim to ride on his motorcycle to fetch a new tyre as there was some problem as to tyre of the motorcycle rode by the victim and her sister earlier. The appellant instead took the victim to an undergrowth area and had forced the victim to have sex with him. The victim then pleaded to the appellant and told him that her mother was ill. The appellant instead took the victim's Samsung Galaxy Y handphone when the said handphone dropped out from the victim's pocket while she was putting on her pants after it being taken off earlier by the appellant;

(iv) the magistrate had taken the initiative to lay down all the previous offences and the sentences imposed on the appellant at p 10 of the record of appeal for Appeal No 41H-33–04 of 2014 as follows:

> Fakta Ringkas Kes
>
> Orang kena Tuduh (OKT) telah dituduh atas kesalahan seperti di atas. OKT telah mengaku salah terhadap pertuduhan tersebut setelah memahami sebab dan akibat daripada pengakuan salahnya ini. OKT

sedang menjalani hukuman penjara di atas 7 kesalahan seperti berikut:

1.

Mahkamah Majistret Kampar, Perak — Seksyen 506, Seksyen 354 dan Seksyen 170 Kanun Keseksaan

Kes No. 83–320–11/13:

d. 12 bulan penjara dari tarikh tangkap 6/10/2013.

e. 36 bulan penjara dari tarikh tangkap 6/10/2013.

f. 12 bulan penjara dari tarikh tangkap 6/10/2013.

2.

Mahkamah Sesyen Ipoh — Seksyen 376/511 Kanun Keseksaan

Kes No. 62–230–10/2013:

(a) 8 tahun penjara daripada tarikh tangkap 5/10/2013 dan sebatan 5 kali.

3.

Mahkamah Sesyen Ipoh — Seksyen 376/511 Kanun Keseksaan

Kes No. 62–229–10/2013:

(a) 8 tahun penjara daripada tarikh tangkap 7/10/2013 dan 2 kali sebatan rotan.

4.

Mahkamah Sesyen Ipoh — Seksyen 377C Kanun Keseksaan

Kes No. 62–233–10/2013:

(a) 12 tahun penjara dan 4 kali sebatan rotan. Hukuman berjalan setelah OKT selesai menjalani hukuman 62–229–10/2013.

5.

Mahkamah Sesyen Ipoh — Seksyen 376 Kanun Keseksaan

Kes No. 62-231-10/2013:

(a) 15 tahun penjara dan sebatan 5 kali. Hukuman berjalan serentak dengan *62–232–10/2013* dan *83–38–10/13*. Hukuman berjalan selepas selesai hukuman 62-233-10/13.

6.

Mahkamah Sesyen Ipoh — Seksyen 377C/511 Kanun Keseksaan

Kes No. 62–232–10/2013:

b. 7 tahun penjara dan 3 kali sebatan. Hukuman berjalan serentak dengan *62–231–10/2013* dan *83–38–10/13*. Hukuman berjalan selepas selesai hukuman *62–233–10/13*.

7.

Mahkamah Sesyen Ipoh — Seksyen 170 Kanun Keseksaan.

Kes No. 83–38–10/13:

c. 6 bulan penjara. Hukuman berjalan serentak dengan *62–231–10/2013* dan *62–232–10/13*. Hukuman berjalan selepas selesai hukuman *62–233–10/13*.

[4] The seven offences and the sentences imposed can also be found from the seven warrants at pp 29–31 of the appeal record No 41H-33–04 of 2014.

[5] In the upshot, the appellant was sentenced to a total of 36 years and three months of imprisonment and a total of 19 strokes of whipping.

[6] Learned counsel for the appellant in his written submission prayed for the sentences to run concurrently taking into account that for all the offences in the appeals the appellant had pleaded guilty at the very early stages and had therefore saved the court's time. Learned counsel further argued that the guilty plea of the appellant had spared the victims from coming to court to testify and they did not have to relive their traumatic experience.

[7] Learned counsel added in his oral submissions before this court that the total imprisonment sentence of 36 years and three months would mean that the appellant had to spend 24 years of his life in prison taking into account the 1/3 remission. In other words learned counsel invited this court to consider the crushing effect of the totality of the sentences on the appellant. The appellant was approaching 28 years of age when these appeals were heard. Learned counsel prayed for this court to consider the mitigation of the appellant in his letter of 16 June 2014.

[8] The appellant's letter are reproduced below:

Tarikh : 16 Jun 2014

Yang Arif

Tuan Hakim Yang Bijaksana

Mahkamah Tinggi Ipoh

Perak Darul Ridzuan

Yang Arif,

RAYUAN UNTUK HUKUMAN JALANKAN SERENTAK DAN KURANGKAN HUKUMAN DAN SEBATAN

Merujuk perkara di atas, saya Malek Ridzuan bin Isrol No. Banduan 7.13.0014 yang telah melakukan kesalahan Seksyen 170-354-376-376/511-377C- 379-506 di bawah Akta Kanun Keseksaan.

2. Pada 05-10-2013, saya telah dijatuhkan hukuman oleh Mahkamah Sesyen, Ipoh selama 36 tahun 3 bulan 2 hari penjara memohon belas ihsan dan pertimbangan sewajarnya daripada Yang Arif, bagi mengurangkan hukuman penjara dari 36 tahun 3 bulan 2 hari kepada 12 tahun di atas sebab berikut:–

(a) Saya sudahpun insaf sepenuhnya di atas kesemua kesalahan saya.

(b) Oleh kerana saya sudah pun bertaubat sepenuhnya.

(c) Saya sudah menginsafi kesalahan saya oleh kerana saya banyak mempelajari ilmu agama islam di dalam penjara.

3. Sukacita saya memohon belas ihsan sewajarnya daripada Tuan Hakim agar memberi peluang untuk saya berbakti kepada ahli keluarga dan masyarakat selepas pembebasan saya nanti.

4. Saya berjanji dan bersumpah akan menunaikan tanggungjawab saya kepada kesemua ahli keluarga dan kepada kesemua ahli keluarga dan masyarakat selepas dibebaskan nanti dan juga negara. Saya tidaklah mencederakan sesiapa atau pun seseorang mangsa hanya saya; saya mengikut hawa nafsu syaitan dan tidak menggunakan akal fikiran yang waras pada masa itu. Saya jahil dalam ilmu agama islam. Setelah dipenjarakan barulah saya kenal agama dari guru agama di penjara semasa saya dihukum. Saya sudah pun insaf dan bertaubat sepenuhnya tidak mengulangi lagi kesalahan ini selama-lamanya dan akan mematuhi undang-udang sepanjang hayat saya.

5. Saya merayu dan memohon jasa baik Tuan Hakim agar dapat mempertimbangkan permohonan saya ini sewajarnya.

Sekian, terima kasih.

Yang benar

Malek Ridzuan bin Isrol

No. Banduan 7.13.01143

[9] This court had considered the submissions of learned counsel and the mitigation of the appellant.

[10] But firstly, this court found that all the sentences imposed by all the courts were passed in accordance with the law. For the offence of rape under s 376 of the Penal Code the imprisonment sentence is for a term of not less than five years and not more than twenty years, and the offender shall also be liable to whipping.

[11] Section 377C of the Penal Code (voluntarily commits carnal intercourse against the order of nature without consent) carries the penalty of imprisonment for a term of not less than five years and not more than twenty years and shall also be liable to whipping.

[12] For attempting to commit any offence punishable by the Penal Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, s 511 of the Code prescribed that where no express provision is made by the Penal Code or such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence; provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

[13] For the offence under s 170 of the Penal Code, (impersonating a public servant) the maximum sentence is twenty years or with fine or with both.

[14] For the offence of theft under s 379 of the Penal Code, the maximum sentence is seven years of imprisonment or fine or with both.

[15] Based on the above provisions, the learned sessions judges and magistrate had not erred in imposing on the appellant the sentences appealed against.

[16] The learned sessions judges as well as the learned magistrate had taken into account the guilty plea of the appellant and had applied all the principles of sentencing accordingly and correctly. It was obvious that immediate prison sentences are necessary to protect the interests of the public and to punish and deter the appellant. Those were the basis that the learned sessions judges and the learned magistrate were acting upon in passing the appropriate sentences.

[17] The power of sentencing given to the trial court is discretionary. In an appeal against sentence, an appellate court would not disturb the sentence imposed unless the trial court had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous exercise of discretion. In the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 at p 84 the Federal Court stated:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as

> to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight.

[18] In the case of *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441, it was stated that a plea of guilt is a mitigating factor and in the case of *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45, it was stated that it is an accepted rule of practice that an accused should be given credit. But this is not a strict rule as the court may refuse to grant any discount in cases where public interest demands a deterrent sentence.

[19] This court found that there were no cogent reasons to disturb the findings made by the learned sessions judges and the magistrate in imposing the sentences on the appellant. The sentences passed by the learned sessions judges and magistrate were not manifestly inadequate or grossly excessive or illegal. Further, the public interest can only be served and best served when a deterrent sentence is meted out to send a strong message to the society at large that the court will never tolerate these offences. In short, the public interest outweighed the guilty plea of the appellant.

[20] This court also found that all the offences committed by the appellant were distinct and separate offences. Therefore, consecutive sentences are necessary to discourage the type of criminal conduct of the appellant.

[21] This court is always reminded and guided by the 'single transaction' principle. In applying this principle, four tests need to be applied ie proximity of time, proximity of place, continuity of action and purpose or design. In the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534, Augustine Paul JCA stated:

A In deciding whether the terms of imprisonment should be consecutive or commence at another date, the court will be guided by the one transaction rule and the totality principle.

Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be B concurrent rather than consecutive (see *R v Saleem* (1964) Crim LR 482; *R v Walsh* (1965) Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v Public* C *Prosecutor* [1955] 1 MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v Public Prosecutor* [1992] 1 SLR 81 at p 83:

The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner* (1972) 56 Cr App R 594, *R v Wheatley* (1983) 5 Cr App R (S) 417 D and *R v Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

E

[22] It was obvious in the appellant's case before this court , all the offences in all the cases are separate and distinct. The learned sessions judges and magistrate were justified in ordering the sentences to run consecutively.

F

[23] As in the Case No 62–229–10 of 2013 (attempted rape) and Case No 62–233–10 of 2013 (voluntarily committing carnal intercourse against the order of nature without consent), there was no element of continuity of purpose or design. The nature of the offences are similar but the offences are G clearly distinct. Different victims were involved as well.

[24] For Case Nos 62–231–10 of 2013, 62–232–10 of 2013 and 83–38–10 of 2013 the offences were also distinct and separate from the offences in Case Nos 62–229–10 of 2013 and 62–233–10 of 2013. For Case Nos 62–231–10 H of 2013, 62–232–10 of 2013 and 83–38–10 of 2013 different victims were involved from Cases Nos 62–229–10 of 2013 and 62–233–10 of 2013 and the offences were committed on different days and at different locations.

[25] In Case No 83RS-4–3 of 2014, the learned magistrate was also right in I ordering the sentence of 15 months imprisonment for the offence under s 379 of the Penal Code to run after the appellant has served all the sentences for the other offences as they were distinct and separate offences. The offence under s 379 of the Penal Code was committed at different time, date, place and entirely of different facts and complainant.

[26] In the case of *Public Prosecutor v Yap Huat Heng* [1985] 2 MLJ 414; [1986] CLJ (Rep) 645 at p 416 (MLJ); p 648 (CLJ) para a–b, Shaik Daud Ismail J stated:

> ... Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted or a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.

[27] The seriousness of the offences committed by the appellant warrants a lengthy imprisonment sentence. Even though the sentences imposed will have a crushing effect on the appellant, the seriousness of the offences committed and the demand of protection of the public interest forfeited the interest of the appellant. Augustine Paul JCA in the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 further stated:

> In explaining the totality principle, His Lordship referred (at p 85) to the view of *DA Thomas in Principles of Sentencing* (2nd Ed) at pp 57–58: 2004 2 MLJ 534 at 540
>
> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his records and prospects.
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> In this regard, reference is also made to *Emmins on Sentencing* (2nd Ed) p 151:
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> > It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.
>
> There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v R* (1991) 55 A Crim R 201). As O'Bryan J said in *R v Vaitos* (1981) 4 A Crim R 238 at p 301:
>
> > I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.
>
> Young CJ said in that case that the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served but by the circumstances of the case.

[28] Having regard to all the facts of the cases, this court found that it was without doubt the offences committed by the appellant are serious offences. Rape and committing carnal intercourse against the order of nature without consent are heinous crimes and must be severely punished. It would not be an exaggeration to say that from the facts of all the cases, the appellant could be equated to that of a sexual predator. He attacked young victims. The appellant was a real threat to the public and to young girls in particular. The victims would surely have to bear forever the ugly memory of rape and being sodomised. The public must be protected.

[29] The appellant also had a *modus operandi* by impersonating. The safety of the public is at stake with criminal like the appellant around. He is not suitable to be in the community. He must be incarcerated from the society for a longer period of time.

[30] The offence committed by the appellant under s 379 of the Penal Code is rampant in the society. Public interest would also demand for a deterrent sentence to be imposed. The DPP forwarded the case of *Public Prosecutor v Wong Chak Heng* [1985] 1 MLJ 457 at p 458 para G to p 459 para C where Chan J had made a very interesting observation by stating:

> ... This is because motorcar theft and the theft of articles from motorcars are a daily occurrence throughout the country. In ordinary circumstances, petty theft would not have attracted any immediate sentence of imprisonment. But when one considers the extent to which the stealing of motorcar parts and accessories is rife at the present day, then the court inevitably must view such an offence as a very serious crime indeed. Let it be repeated: it may be necessary to set out and stress the reasons why at the present time offences of this kind should be dealt with severely and usually by a custodial sentence. On all sides members of the public, if they have not lost their cassette players or radios or even their cars, hear that their friends and relatives have. The public are entitled to be protected against such offenders. In the opinion of this court, they are not likely to be protected if lenient sentences are passed. Offenders are not likely to be discouraged by sentences which do not involve loss of liberty.
>
> If an immediate prison sentence is necessary, as I believe to be the case here, then it should be consistent with the duty to protect the interests of the public and to punish and deter the criminal. To use the words of Lawton LJ in *Reg v Davies* (1978) 67 Cr App R 207, 210:
>
> > the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct.

[31] Although the appellant was charged for theft in Case No 83RS-4–3 of 2014 (Appeal No 41H-33–04 of 2014), the facts of the case revealed that he attempted to have sex with the victim.

[32] The appellant is a repeated offender, no doubt. The same nature of the offences committed repeatedly revealed the depth of the darkness of his heart in perpetuating the crime against such young and helpless victims in the most heinous manner. Public would cry for protection against criminal like the appellant who showed no conscience whatsoever. The law must step in not only to show disapproval but also to prevent the recurrence of such crime in the very vein of the society.

[33] In the case of *Mohd Zandere bin Arifin v Public Prosecutor* [2006] 5 MLJ 685 at p 695; [2006] 5 CLJ 663 at p 674 para G–p 675 para A, Ahmad Maarop J (as His Lordship then was) stated:

> In the appeal before me the appellant had committed three distinct offences of incest. Although the victim in the three charges was the same and although the offences were perpetrated at the same place, they were perpetrated on three different dates within the period of about seven months. In my judgment the sentences passed must truly reflect the fact that in this case the appellant had committed three distinct offences of incest and that he is being duly punished for the three distinct offences. This, to my mind, could only be achieved by ordering the three sentences to run consecutively. I realise that the term of 18 years imprisonment imposed on each count in this case was almost the maximum sentence which could be imposed for an offence of incest under s 376B. I also realise that the cumulative effect of the sentences on the appellant (18 years x 3) will have a crushing effect on the appellant. However, this must be balanced against the very grave nature of the offences committed by the appellant and the demand of public interest on this type of offences. Having said that I must add that there is nothing in the Penal Code or the Criminal Procedure Code to explain what sort of incest could be categorised as the worst possible example of the offence of incest under s 376B of the Penal Code. Section 376B of the Penal Code provides the minimum sentence of six years and maximum sentence of 20 years. In my view what could be considered as the worst possible example of the offence of incest under s 376B would depend on the facts and circumstances of each case. From the facts of this case which I have adverted to, I have no hesitation in concluding that the offences committed by the appellant were among the worst kind under s 376B of the Penal Code.

[34] It is true that the appellant has to face a very long term of imprisonment before he will be released. He is also a young man and many of his best years of his life will be spent in custody. However from the public interest view, his detention for a substantial period is necessary to protect women and girls in particular, from his criminal behaviour.

[35] In his mitigation through his letter of 16 June 2014, the appellant stated that he had repented after gaining religious knowledge in the prison which he had been deprived of when he was a free man. This court has this to say; let him be in prison for a longer time as he can gain more knowledge of the religion which will hinder him from committing those crimes again. The

appellant should be given the opportunity to be rehabilitated in the prison as he admitted that he had gained such benefit from the religious knowledge imparted to him.

[36] For the reasons stated above, the appellant's appeals were dismissed. The sentences passed by the learned sessions judges and magistrate were affirmed.

Appeal dismissed; affirming sentences passed by the sessions and magistrate courts.

Reported by Afiq Mohamad Noor